

DAIRY AMERICA, INC.,)	AGBCA No. 2001-167-1
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Appellant)	
)	
Representing the Appellant:)	
)	
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Dairy America, Inc.)	
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)	
Representing the Government:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

December 20, 2001

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO.

On August 24, 2001, Dairy America, Inc., of Fresno, California (contractor), filed this appeal with the Board, involving a contract, No. VDPM01569, to provide non-fat dry milk to the respondent, the U. S. Department of Agriculture, Commodity Credit Corporation (CCC). The contractor disputes the conclusion of the contracting officer that one shipment was short-shipped and that the contractor is obligated to return \$9,073.59.

A clause in the contract states that when a dispute arises concerning the quantity of commodity loaded, and railcars arrive with seals intact, the consignee's receipt will be accepted by the contractor as representing the quantity of the commodity loaded and shipped. The Government relies upon the consignee's count of product at the time of unloading of a railcar which arrived with seals intact. The contractor maintains that weight certificates demonstrate that the delivery was not short-shipped.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The Government has filed a motion for summary judgment, maintaining that it is entitled to relief given the contract clause and the undisputed facts. The contractor opposes the motion, as it asserts that it delivered the greater quantity of commodity, as supported by a weight certificate prepared by the carrier railroad.

The contract dictates that, when a dispute arises concerning the quantity of commodity shipped (and when seals arrive intact), the consignee's receipt will be accepted by the contractor as representing the quantity shipped. The contract clause anticipates and specifies how to resolve the present dispute. The consignee's receipt, which was verified by a recount, is dispositive of the dispute. In light of the clause, and asserted facts, the weight certificates are no more reliable than the consignee's receipt. Accordingly, the Board grants the Government's motion for summary judgment and denies the appeal.

FINDINGS OF FACT

1. One of the terms and conditions found in Announcement Dairy-5, Purchase of Bulk Dairy Products (Sept. 25, 1992), regarding shipment and delivery--transfer of title is as follows:

When a dispute arises concerning loading and bracing of the conveyances or the quantity of commodity loaded, and the seals on the conveyances are intact upon arrival at destination, the consignee's receipt will be accepted by the contractor as representing the conditions of loading, bracing, and the quantity of the commodity loaded and shipped.

(Exhibit R at 13 (¶ 10.A(3)(c))) (all exhibits are attached to the Government's motion for summary judgment).

2. The Government ordered non-fat dry milk pursuant to an offer of the contractor to provide the same in accordance with the terms and conditions of Announcement Dairy-5. The contract date is July 3, 2000, for contract number VDPM01569, sub-item 05. (Exhibits A, B.) For a fixed unit price, the contractor was to provide 2,299 units (25 kg bags) of non-fortified nonfat dry milk (Exhibits B, C).

3. A consignor's shipping statement indicates that 2,298 units were shipped on July 24, 2000, via railroad (Exhibit D).

4. The consignee's receipt specifies that the goods were received at the designated location on August 8, 2000, with seals intact. The receipt notes a shortage of 163 units was discovered after unloading; that is, 2,135 units were received (with 8 units damaged) instead of 2,298. (Exhibit E). A recount dated August 14, indicates that 2,135 units were received (Exhibit G).

5. The contracting officer issued a decision dated July 3, 2001, in response to a contractor request. The decision seeks repayment of \$9,073.59, plus interest subject to regulation. This

amount of repayment is for the 163 units at the contract price. (Exhibit H.) The contractor has not suggested that it has not received payment for the shipment of 2,298 units.

6. The contractor has submitted with its notice of appeal a letter, dated July 24, 2001, from the manager customer claims of the carrier railroad to the contractor. The letter states, in pertinent part:

It is rare that bagged product is weighed, but Dairy America can produce a scale ticket. This is a certified [carrier] scale ticket. Scale tickets are not produced from [sic] hump scales. I believe this ticket with its 45 pound difference between Bill of Lading weight and scale weight proves that Dairy America did indeed load the weight shown on the Bill of Lading.

In the absence of a certified scale ticket at destination, and because the car arrived under intact seals, I must conclude that the bags were miscounted at destination.

(Exhibit Q.)

7. Maintaining that the shipment was not short, the contractor filed its appeal with this Board on August 24, 2001.

DISCUSSION

The Government has moved for summary judgment. It maintains that given the contract clause, the consignee's statement of receipt resolves the dispute.

In its response to the motion for summary judgment, the contractor states:

What does seem apparent and of concern to us (and we think should be of concern to the CCC) in this instance is the extent of the discrepancy between the weight certificate prepared by an independent third party and the Receiving/Shipping Tally Sheet logging in receipt of the product. Certainly, the independently prepared weight certificate you have had an opportunity to review does not indicate a shortage of 8,983.75 pounds. Additionally, after loading the product at the plant, the car was properly sealed, was then weighed by the [carrier], and arrived at [destination] with seals intact.

We are asking that you recognize the validity of the weight certificate prepared independently of the interests of the contractor or the consignee as the true weight and volume of product that arrived at the warehouse and dismiss disputed charges.

(Contractor submission, Oct. 9, 2001.)

The contract anticipates a dispute over the quantity of goods shipped and expressly dictates how the dispute is to be resolved. Under the terms of the agreement, the consignee's receipt resolves the dispute.

In disputing the accuracy of the consignee's receipt, the contractor asks that this Board recognize the carrier's weight certificate as representing the true volume of goods received. Given the evidence and arguments supporting the different quantity asserted by each party, the request runs contrary to the clause. The clause makes the consignee's receipt, not a carrier's weight certificate, determinative of the quantity of goods shipped. The contractor seeks to engage the Government and this Board in resolving the dispute in contravention of the contract-prescribed methodology. The contractor has not presented a basis to deviate from the terms and conditions of the contract.

DECISION

The Board grants the motion for summary judgment submitted by the Government; the Board denies this appeal.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

HOWARD A. POLLACK

Administrative Judge

ANNE W. WESTBROOK

Administrative Judge

Issued at Washington, D.C.

December 20, 2001